

ХИМИКА

APPENDIX

Address by J. E. Welch, Deputy General Counsel, General Accounting Office, before Government Contracts Committee, D. C. Bar Association, January 13, 1966, on Unliquidated Damage Claims for Breach of Contract.

Our subject today, as announced by your chairman, is "Administrative Authority to Settle Unliquidated Damage Claims for Breach of Government Contract." My purpose, as I understand it, is to tell you what we in GAO consider the rule to be, explain the apparent basis for the rule and give you the reasons why GAO thinks it is a necessary and proper rule.

Actually the general rule, as GAO sees and applies it, is that the contracting agencies do not have authority to settle and pay such claims.

There is no specific statutory prohibition against administrative settlement of unliquidated damage claims for breach of contract but the rule undoubtedly has its origin in the old revised statute R.S. 3678 (31 U.S.C. 628) which reads:

"Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

Applying this statute the theory is, of course, that contract appropriations are made to pay for performance of contracts not for failure to perform.

While no laws exist which specifically prohibit administrative settlement of unliquidated damages for breach of contract, the rule against such settlement has been asserted and followed many times over the years in decisions rendered by the Attorney General, the Courts and the Comptroller General. The latter official, as you know, heads the General Accounting Office.

In 1832 Attorney General Taney held (Atty. Gen. Op., ed. 1841, p. 882) that it was not within the power of the executive branch of the Government to liquidate and pay damages sustained by a contractor whose contract had been breached by Government's refusal to accept delivery according to the contract.

In 1844 the then Attorney General held that accounting officers of the Treasury have no authority to adjust the claims of contractors for damages, without the special authority of an act of Congress. 4 Op. Atty. Gen. 327.

In an Attorney General opinion decided in 1922 the rule in the form most frequently stated was set forth. That case involved a submission by the Secretary of War asking whether there was a contract, whether there was legal authority to make such a contract, whether such contract had been breached and if so what damages were owing. The Attorney General replied that it was unnecessary to express an opinion as to the legal effect of the transaction because, he said, "It is well established that the head of an executive department is without authority to settle a claim for unliquidated damages." 33 Op. Atty. Gen. 354.

Other Attorney General opinions have so held. See, for example, 4 Op. Atty. Gen. 627; *id.* 516 and 14 *id.* 24.

This unliquidated damages rule has been stated in numerous Court of Claims decisions dating at least from 1866 to the present time. See, for example, *Carmick v. United States*, 2 Ct. Cl. 126, 140 (1866); *Powers v. United States*, 18 Ct. Cl. 263 (1883); *McClure v. United States*, 19 Ct. Cl. 18, 28 (1883); *Dennis v. United States*, 20 Ct. Cl. 119, 120-121 (1885); *Brannen v. United States*, 20 Ct. Cl. 219, 224 (1885); *Miller, Inc. v. United States*, 111 Ct. Cl. 252 (1948); *Langevain v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Company v. United States*, 101 Ct. Cl. 148 (1944). The two most recent Court of Claims decisions on the point are *Utah Construction and Mining Co.*

v. *United States*, Court of Claims No. 3-61, December 11, 1964; and *Brock & Blevins Co., Inc. v. United States*, Court of Claims No. 292-59, April 16, 1965. I will discuss both of these cases later on.

Even the Supreme Court of the United States has subscribed to and applied the rule. In *Cramp v. United States*, 216 U.S. 494, 500 (1910) the Supreme Court expressly stated:

"It is well understood that executives officers are not authorized to entertain and settle claims for unliquidated damages."

Also, see *Cramp v. United States*, 239 U.S. 221, 227 (1915).

The Comptroller General has rendered a number of decisions since the GAO was established in 1921 taking the same position. For example, see 18 Comp. Gen. 199 (1938); 18 Comp. Gen. 261 (1938); 19 Comp. Gen. 933 (1940); 32 Comp. Gen. 333 (1953); 26 Comp. Gen. 647, 649 (1947); and 44 Comp. Gen. 353 (December 1964).

In the last cited case the Secretary of the Interior requested a decision from the Comptroller General as to whether a claim of a construction contractor for additional costs incurred due to delay by the Government in furnishing borrow material properly could be allowed under the changes clause of the contract. The Comptroller General pointed out that the changes article relates to changes in drawings, designs and specifications not to a claim for additional costs resulting from delays in performing the unchanged work attributable to the Government. He then held that the claim was one for unliquidated damages for breach of contract and that neither the Secretary of the Interior nor the contracting officer had authority to settle the claim under the disputes clause of the contract or otherwise. In his decision the Comptroller General quoted extensively from the decision of the Court

of Claims in the *Utah Construction and Mining Co.* case to which I have already referred. In that case the court made the following pertinent statements:

"Where the dispute 'arises under the contract' the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Co. v. United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States v. Beuttas, et al.*, 324 U.S. 768 (1944) If they undertake to do so—which they rarely do—neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882); *Coyle v. Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F. Supp. 109, 111 (S.D.N.Y. 1941).

"Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to 'disputes concerning questions of fact arising under this contract.' This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract."

In conclusion the court held that, since the case involved an action for breach of contract, the parties were not

bound by the decision of the board of contract appeals; that they therefore could introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby. The Supreme Court has granted *certiorari* in this case. Perhaps that Court will clear up this whole problem area.

It has been repeatedly argued that notwithstanding the rule as acknowledged in the above decisions the Court of Claims has held in *Cannon v. United States*, 162 Ct. Cl. (1963), with subsequent reference thereto in *Brock v. United States*, Court of Claims No. 292-59, April 16, 1965, that a contracting officer and the procuring agency have inherent authority outside the contract provisions to settle, by mutual agreement with the contractor, claims for unliquidated damages for breach of contract arising from Government delay. It should be noted that in both of those cases the contractor's claim was disposed of by the court on the basis of complete accord and satisfaction which the court said barred the suits. In the *Cannon* case any damages were considered to have been included in an equitable adjustment made pursuant to the contract's "Suspension of Work" clause. In the *Brock* case the court stated that "The claim for damages was necessarily considered by both parties as an integral part of the claim for extra work" for which settlement had been made in the form of a modification to the contract under its "Changes" clause. The court thus obviously considered that such settlements had their foundation in contractual provisions and that therefore they did not seem to be clearly objectionable as being based on an application of other than established legal principles.

At this point I should mention that the Supreme Court in *United States v. Corliss Steam-Engine Company*, 91 U.S. 321 (1875), held, in effect, that the head of an agency may terminate a contract he was authorized to make whenever the public interest may so require and may settle

with the contractor for the partial performance of the contract. In a decision by our Office dated February 5, 1965, 44 Comp. Gen. 466, to the Postmaster General we pointed out that we have long recognized the *Corliss* holding but expressed the view that there is a clear distinction between claims for damages resulting from the culpable failure of the Government to carry out specific obligations under its contracts and claims for compensation for work, etc., performed under a valid and subsisting contract which has been terminated in the public interest. In view of such distinction, and since we do not regard the *Corliss* case as contemplating or encompassing breaches of contracts other than the type considered therein, we do not conclude that it may reasonably serve as controlling authority for the administrative negotiation of a mutually satisfactory settlement of claims for unliquidated delay damages. We feel such a conclusion would be in disregard of subsequent expressions of well recognized limitations concerning administrative settlement of unliquidated damages claims, including the Supreme Court's later holding in the *Cramp* cases, which I have already discussed. Remember the *Corliss* case was decided in 1875 but you will recall, as I have pointed out, the Supreme Court in the 1910 *Cramp* case said:

"It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages."

In any event, it seems obvious that the Court of Claims did not consider it was departing from the general rule in reaching its conclusion in the *Brock* case. This is so because in the decision the court specifically stated that "The question arises as to how an equitable adjustment may include damages for breach, when only this court has jurisdiction to entertain an action for breach." To my knowledge, that is the Court of Claims' latest pronouncement on the subject—"only this court has jurisdiction to entertain an action for breach."

After pointing out that I now must tell you that GAO considers it has jurisdiction over claims for breach of contract. The position of the Office in that regard is based upon the comprehensive provisions of section 305 of the Budget and Accounting Act, 1921 (31 U.S.C. 71) that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Consequently, in concluding his decision in the Department of the Interior case the Comptroller General advised the Secretary that GAO will settle breach of contract claims where there is no doubt involving liability of the Government and the amount of damages can be determined with reasonable certainty, and that therefore he would be willing to consider a voucher to cover the damage claim of the contractor in an amount administratively determined to be due if that amount were acceptable to the contractor in full and final settlement of its claims.

I would like now to discuss the practical reasons why GAO feels the rule against administrative settlement of breach of contract claims is necessary and proper to adequately protect the Government's interest.

In the first place there generally exists considerable if not extreme doubt as to whether there was an actionable breach, that is, whether the Government is legally liable for breach of contract. This can be and generally is an unusually difficult question. Among other things the answer to that question frequently turns on the further question of whether the Government's delay was reasonable under the circumstances. After the question of breach has been decided in the affirmative another very doubtful question must be decided. That is the amount of damages properly payable to the contractor. In other words then

claims for unliquidated damages for breach of contract generally constitute one of the most doubtful and difficult classes of claims that can be presented to the Government or to the courts for that matter. The duty of the executive agencies and the accounting officers of the Government with respect to claims as to the validity of which there is serious doubt was spelled out long ago by the Court of Claims in *Longwill v. United States*, 17 Ct. Cl. 288 (1881) and *Charles v. United States*, 19 Ct. Cl. 316 (1884). The court in the latter case stated:

“When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the government in the case of claims of doubtful validity in fact or in law. * * *”

The lack of an adequate procedure for administrative settlement of breach of contract claims is another practical reason why GAO would be reluctant to agree to any change in the rule against administrative settlement. If the rule did not exist under what procedure would such claims be settled administratively—necessarily under the disputes clause procedure. However, it must be realized that that procedure offers no protection to the Government against erroneous and adverse decisions by administrative officials. It is a one way street—it serves as a protection of the rights of contractors only. Consider the language of the standard disputes clause. First, it provides that the decision of the contracting officer shall be final and conclusive unless appealed by the contractor to the head of the agency within 30 days. Note that the clause says “appealed by the contractor” not the Govern-

ment. It thus can be reasonably argued that even if a contracting officer's decision against the Government on a question coming under the disputes clause is erroneous it is final and conclusive without any right of appeal on behalf of the Government. Secondly, the clause provides that the decision of the head of the agency or his duly authorized representative on the appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith or not supported by substantial evidence.

Incidentally, I can tell you from my own first-hand information that the language of the clause attempting to limit the appeal to a "court of competent jurisdiction" is intentionally designed to preclude any review of board decisions by GAO. Pursuant to its general settlement authority however our Office has, although infrequently, questioned disputes clause decisions as not meeting the standards set forth in the Wunderlich Act, 41 U.S.C. 321. That act as you know provides in effect that board decisions under contract dispute clauses on disputed questions of fact shall be final and conclusive unless fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence. GAO thinks that the Congress when it was considering the Wunderlich Act recognized that the GAO should have the authority to exercise necessary and desirable review functions in this area. In addition to the fact that the act does not limit review to a court of competent jurisdiction as the standard disputes clause attempts to do, the House Report (No. 1380) on the bill which ultimately became the law contains this statement:

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the juris-

diction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended [with respect to review of administrative decisions] should not be construed as taking away any of the jurisdiction of that office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.' Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision."

But getting back to the appeal procedure generally—many board decisions adverse to contractors have been and are continually being appealed by the contractors to the Court of Claims. I know of no instance though where a board decision against the Government has ever been so appealed except in the very few cases which have been forced into the court by action of GAO. The contracting agencies have no procedure for filing appeals, or if they do they do not exercise it for the obvious reason that the boards are representatives of the heads of the agencies. Consequently then, in addition to the fact that the Government has no right of appeal whatever from contracting officers' disputes clause decisions, as a practical matter there is presently no procedure in existence for appeal to the courts by the Government on matters decided by the boards under disputes clauses.

I want to point out also that the fact that the boards represent the heads of their respective agencies for administrative purposes furnishes no justifiable basis for the

argument that board decisions are the Government's decisions and therefore should not be appealable on behalf of the Government. This is the argument most generally advanced, I believe, but it is a fallacious argument that does not face up to the realities of the situation. It is a matter of record that contracting officers frequently render erroneous decisions against contractors and that on occasion at least the various boards also erroneously decide against contractors. This is evidenced by the many successful contractor appeals made to the boards and the courts. Certainly there is no reasonable basis to assume that contracting officers and boards do not render an equal number of erroneous decisions against the Government. Thus the argument that the Government is not in need of the protection afforded by judicial review because such decisions are made by Government officials overlooks the fact that such officials can err in favor of contractors as well as the Government. The argument also ignores the fact that contract disputes hearings are adversary proceedings in which the hearing tribunal should be—and no doubt prides itself on being—impartial and independent. To view the appeals boards purely as agents of the Government in connection with their decision making function would reduce them to a subservient status with the implication that they are incapable of exercising independent, fair and impartial judgment. The fact is the contract appeal boards have in effect become institutionalized and have a long and honorable history of fair, impartial and independent adjudication of disputes brought before them by contractors. However, like any tribunal, judicial or administrative, they can commit errors of law or fact in making their decisions and no responsible critic today would contend that in the hearing of a case they represent the department's or agency's interest. As I understand it, in the proceedings before the boards the Government's interest, the same as the contractor's, is generally represented by a trial attorney. For example, the rules

governing the procedures before the ASBCA provide that Government counsel designated by the various departments, agencies, directorates and bureaus cognizant of disputes brought before the Board "may in accordance with their authority represent the interests of the Government before the Board." Under the rules these Government attorneys may move for reconsideration by the Board but unlike the contractor's attorneys, the Government's attorneys are precluded from appealing by the lack of an adequate appeal procedure.

So long as this situation prevails, I think the GAO can be expected to favor a continuation of the present rule which precludes contracting officers and appeal boards from taking jurisdiction over unliquidated damage claims for breach of contract. Of course I think too that, if the rule is changed by authoritative court decisions, GAO will undoubtedly fall in line and follow the precedents thus established.

